BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Business Data Services in an Internet Protocol Environment	WC Docket No. 16-143
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	WC Docket No. 15-247
Special Access Rates for Price Cap Local Exchange Carrier	WC Docket No. 05-25
AT&T Corp. Petition for Rulemaking to Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	RM-10593

COMMENTS OF THE QUILT

August 9, 2016

I. INTRODUCTION

The Quilt appreciates the opportunity to file these reply comments in response to the Federal Communications Commission's (FCC's) Further Notice of Proposed Rulemaking (FNPRM) in the above referenced dockets.[1] The Quilt[2] is a non-profit 501(c)(3) organization that represents over thirty-five of our nation's most advanced non-profit regional Research & Education (R&E) Networks in a variety of states across the U.S. R&E Networks are non-profit organizations that provide, high-capacity advanced network services, Internet access and related services to anchor institutions in their states, often over fiber optic networks.

By mission, R&E networks do not provide services to residential customers or commercial end-users. Most Quilt members began service by providing high-capacity data services to institutions of higher education. R&E Networks have been designed to meet the needs of these most demanding Internet users in the country: scientists, academics and researchers in our nation's leading academic institutions. As non-profit providers, R&E networks offer specialized, high-capacity data services and related services customized to meet the specific requirements of their constituencies. As we have stated in our comments in the E-rate proceedings, Quilt members do not serve the general public and thus are neither common carriers nor "telecommunications carriers".[3]

The Quilt has not participated in this proceeding before now because of our understanding that the proceeding did not impact R&E networks. Most R&E Networks own

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[1] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, Tariff

[2] More information about the Quilt, including a list of our members, is available at www.thequilt.net.

[3] See 47 U.S.C. 153(53) (Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

and control their own middle-mile and some last mile network infrastructure. Where last mile network infrastructure is not owned, R&E networks negotiate to obtain last mile-circuits to connect their member sites.

The broad language in the FNPRM is generating confusion over the regulatory treatment of private networks, such as those operated by Quilt members. The Commission has a long history of treating R&E networks as private carriers. Nonetheless, some commenters are interpreting the definition of BDS as if it includes private networks, even though that does not seem to be the Commission's intent. We respectfully ask that the Commission, in whatever decision is reached in this proceeding, clarify that the proposed treatment of Business Data Services (BDS) is restricted to those entities that are operating as common carriers and does not apply to private networks such as those provided by R&E networks that do not serve the general public.

II. THE PROPOSED REGULATORY REGIME FOR BUSINESS DATA SERVICES SHOULD NOT APPLY TO PRIVATE NETWORKS SUCH AS THOSE OPERATED BY RESEARCH AND EDUCATION NETWORKS.

The reason for filing this set of comments is to ensure that the Commission remains clear that the definition of BDS applies only to common carrier networks. The proposed definition of business data services, coupled with the conclusory statement in paragraph 257 that all providers of BDS are telecommunications carriers, has caused some observers to suggest that all providers of high-capacity data services are BDS providers subject to regulation.

Comcast, for instance, suggests that the Commission's regulatory regime might apply to services it offers on a private carrier basis, such as its cell backhaul and E-

Access services even though these services are individually-negotiated with each purchaser.[4] Charter's comments also reflect confusion about the scope of the proposed rules:

> If the Commission extends its proposed new regulations to BDS offered via private carriage—or if it attempts to compel BDS providers to offer all of their services (or some subset of their services) on a common-carriage, rather than a private-carriage basis—the FNPRM does not provide legally adequate notice.
>
> Moreover, any attempt to impose the proposed rules on BDS offerings provided via private carriage would also be unlawful as a substantive matter. BDS provided through private-carriage arrangements is, by definition, not a common-carrier service and therefore does not fall within the scope of Title II. And the Commission may not turn private carriage into common carriage by fiat, based merely on its determination of what is in the public interest.[5]

We believe it is not the intention of the Commission to regulate private carriage arrangements in this proceeding. In paragraph 279 of the FNPRM, the Commission proposes to define BDS "as a **telecommunications service** that:

> transports data between two or more designated points at a rate of at least 1.5 Mbps in both directions (upstream/downstream) with prescribed performance requirements that typically include bandwidth, reliability, latency, jitter, and/or packet loss. BDS does not include "best effort" services, e.g., mass market BIAS such as DSL and cable modem broadband access. [emphasis added]

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[4] See Comcast comments, p. 64 ("Comcast's E-Access service is available only to a limited number of carriers with which Comcast chooses to create a network-to-network interface. And where Comcast does offer E-Access service, its contract pricing and terms are highly individualized for each NNI counterparty."[footnotes omitted])

[5] See Comments of Charter Communications, pp. 17-19.

On its face, this definition only applies to "telecommunications services," and BDS appears to be simply a subset of "telecommunications services." In other words, a provider that is not offering telecommunications services cannot be found to be providing BDS and therefore is not subject to regulation in this proceeding. Read in this manner, the conclusory statement in paragraph 257 that "business data services are telecommunications services, regardless of the provider supplying the service. BDS providers are therefore common carriers" is simply re-stating the obvious – if you are providing a "telecommunications service" then you are a common carrier. By implication, if you are not providing a "telecommunications service" – as R&E networks do not – then you are a private carrier and are not subject to this regulation.

It is our sense that the Commission's intention, and the intention of the parties that are supporting this regulatory regime, is to limit the scope of the regulatory regime to common carriers, not to private carriers. For instance, Sprint agrees that the scope of the rules should only apply to those entities that are providing service to the general public:

> Because BDS amounts to "telecommunications," all providers that offer BDS **to the public** are common carriers and subject to Title II of the Act in their provision of BDS. Thus, to the extent the Commission can regulate BDS prices under Title II, it can do so regardless of supplier. [footnotes omitted][emphasis added][6]

While this principle is straightforward enough, the determination of what is or is not a private carrier or common carrier is not always clear-cut. The classification of the provider's service is not made by the provider; rather, it is a factual inquiry that must

[6] See Sprint comments, p. 92.

be made on a case-by-case basis. While there are a variety of factors that can be considered, the key difference identified by the Court of Appeals in the *Open Internet* proceeding is that private network services involve agreements that are individually-negotiated on a case-by-case basis, whereas "telecommunications services" are offered generally to the public.

In its history, however, the Commission, has not always been crystal clear about what services it will treat as telecommunications services and which services it considers as private network services. Some commenters, for instance, point to FCC decisions regarding the sale of capacity on undersea cables as "telecommunications services" even though the capacity is made available under contract at individually-negotiated prices.

The Commission could go a long way toward clarifying this ambiguity and resolving the confusion by issuing a simple statement similar to the statement included in the *Open Internet* proceeding. In para. 380 of that decision, the Commission clearly identified certain services that are not to be included in the definition of Broadband Internet Access Service (BIAS) as follows:

> Broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services. The Commission has historically distinguished these services from "mass market" services and, as explained in the 2014 Open Internet NPRM, they "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."

While the *Open Internet* proceeding was concerned with a definition of BIAS and not BDS, the *Open Internet* decision is nonetheless an example of how the Commission can clarify in this decision what services are and are not considered to be included in the definition of BDS.

In making that clarifying statement, there are three approaches available to the Commission:

First, the Commission could follow the precedent of the *Open Internet Order* and simply declare that R&E networks as a class are not providers of telecommunications services or BDS and thus are not subject to this proceeding. This has the advantage of providing certainty to the R&E networks and to stakeholders. The Commission could clarify that all non-profit R&E networks do not provide BDS and thus are not subject to the BDS regulatory regime.

Second, in the alternative, the Commission could identify the characteristics of private networks that are not subject to this proceeding. This approach has the advantage of being competitively-neutral; it would base the distinction between a private network and a common carrier on the type of service being provided, rather than the type of provider. The disadvantage of this approach, however, is that attempting to identify the variety of criteria for distinguishing between private and common carrier networks could introduce greater complexity into the analysis. Identifying such criteria could increase the contentiousness of this proceeding by giving other parties an opportunity to argue that their services deserve treatment as private networks. It could invite further case-by-case decision-making and could invite challenges by commercial companies that could complicate this proceeding. The R&E network community would prefer the certainty of a declaration that they are not covered by the regulatory regime, rather than the uncertainty that would result if their status is delayed as the Commission decides how to identify the criteria for everyone else.

A third approach, of course, is for the Commission to do both – affirmatively declare that R&E networks are not BDS providers because of their unique operating characteristics, while exploring how to define the distinction between private networks and common carriers for commercial companies.

There are several reasons for determining that R&E networks should not be considered BDS providers:

- As non-profit providers, R&E networks offer specialized, high-capacity data services and related service customized to meet the specific requirements of their constituencies
- R&E networks do not serve the general public. They serve high-end research organizations and anchor institutions, but they do not serve residential or general commercial accounts
- R&E networks do not engage in mass marketing beyond their constituencies or other advertising to the general public of their services
- R&E networks provide service through individually-negotiated contracts on a customer-by-customer basis.

III. CONCLUSION

The Quilt and its members have not previously filed comments in this proceeding because of our belief that the Commission does not intend its regulation of BDS to implicate private networks such as those operated by the non-profit R&E networks. Nonetheless, there is significant confusion around the definition of BDS and several parties have suggested that the BDS regulatory regime may apply to private networks. If, as we suspect is the case, the Commission does not intend to subject private networks such as R&E networks to regulation as BDS providers, it would be extremely helpful for the Commission to include a specific clarification to this effect, as it did in the *Open Internet* Order adopted last year.

Respectfully Submitted,

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